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IN THE

Supreme Court of the United States

No. 49

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. 48

NATIONAL ASSOCIATION OF BROADCASTERS and WTRF-TV, INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. 51

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

No. [redacted] 47

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., P. LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

APPENDIX TO PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX A

Opinions and Rulings of the Federal Communications Commission

(Reprinted From the Joint Appendix Filed in the Court of Appeals)

15 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

June 2, 1967

Television Station WCBS-TV
51 West 52 Street
New York, New York

Gentlemen:

This letter constitutes the Commission's ruling upon the complaint of Mr. John F. Banzhaf, III, against Station WCBS-TV, New York, N. Y. Mr. Banzhaf, by letter dated January 5, 1967, filed a fairness doctrine complaint, asserting that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, has not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking."

Mr. Banzhaf's letter cites as examples three particular commercials over WCBS-TV which present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life". Mr. Banzhaf, in his letter to you of December 1, 1966 requested free time be made available to "responsible groups" roughly approximate to that spent on the promotion of "the virtues and values of smoking".

Your responsive letter of December 30, 1966 cites programs which WCBS-TV has broadcast dealing with the effect of smoking on health, beginning in September 1962 and continuing to date. It cites six reports on this issue in its evening news programs since May 1966, five major reports by its Science Editor since September 1966 and five one minute messages, which advance the view that smoking is undesirable, broadcast without charge within the last few months for the American Cancer Society. The letter also refers to half hour and hour programs on smoking and health broadcast in 1962 and 1964. You take the position

that the above programs have provided contrasting viewpoints on this issue by responsible authorities, and therefore, that it is unnecessary to consider whether the "fairness doctrine" may be applied to commercial announcements solely aimed at selling products. You state your view that it may not.

In Mr. Banzhaf's complaint to the Commission, he asserts that the programs cited by you as showing compliance with the "fairness doctrine" are insufficient to offset the effects of paid advertisements broadcast daily for a total of five to ten minutes each broadcast day. He also states that the very point of his letters is to establish the applicability of the doctrine to cigarette advertisements.

16 We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

We reject, however, Mr. Banzhaf's claim that the time to be afforded, "roughly approximate" that devoted to the cigarette commercials. The fairness doctrine does not require "equal time" (see Ruling No. II C. 12, 29 F.R. 10419) and, equally important, a requirement of such "rough approximation" would, we think, be inconsistent with the Congressional direction in this field—the 1965 Cigarette Labeling and Advertising Act. The practical result of any

roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 Act Congress made clear that it did not favor such a "drastic" step, but rather wished to afford an opportunity to consider "the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package . . . [on the problem of] adequately alert [ing] the public to the potential hazard from smoking" (Sen. Rept. No. 195, 89th Cong., 1st Sess., p. 5). At the conclusion of a three year period (to end July 1, 1969), and upon the basis of reports from the Federal Trade Commission and the Department of Health, Education, and Welfare (HEW) and other pertinent sources, the Congress would then decide what further remedial action, if any, is appropriate. In the meantime, Congress has promoted extensive smoking education campaigns by appropriating substantial sums for HEW in this area. See P.L. 89-156, Title II, Public Health Service, Chronic Diseases and Health of the Aged.

Our action here, therefore, must be tailored so as to carry out the above Congressional purpose. We believe that it does. It requires a station which carries cigarette commercials to provide a significant amount of time for the other viewpoint, thus implementing the "smoking education campaigns" referred to as a basis for Congressional action in the 1965 Act. See Cigarette Labeling and Advertising Act; remarks of Senator Warren Magnuson, floor manager in the Senate of the bill which became that Act, Cong.
17 Rec. (Daily Edition) Jan. 16, 1967, p. S. 317, 319.

But this requirement will not preclude or curtail presentation by stations of cigarette advertising which they choose to carry.

A station might, for example, reasonably determine that the above noted responsibility would be discharged by pre-

senting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the American Cancer Society or HEW in this field. We stress, however, that in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See Cullman Broadcasting Co., F.C.C. 63-849 (Sept. 18, 1963).

In this case, we note the WCBS-TV is aware of its responsibilities in this area, in light of the programming described in the third paragraph. While we have rejected Mr. Banzhaf's claim of "rough approximation of time", the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking. We note in this respect that, particularly in light of the recent American Cancer Society announcements, you appear to have a continuing program in this respect. The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area.

By Direction of the Commission

Ben F. Waple
Secretary

814 FCC 67-1029
5063

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

RM-1170

In the Matter of

Television Station WCBS-TV New York, New York

Applicability of the Fairness Doctrine
to Cigarette Advertising

Memorandum Opinion and Order

Adopted September 8, 1967; Released September 13, 1967

By the Commission: Commissioners Loevinger and Johnson concurring and issuing statements; Commissioner Wadsworth absent.

1. The Commission has before it for consideration: a "Petition for Rulemaking" and a "Petition for Stay of Effectiveness of Application of Fairness Doctrine to Cigarette Advertising," filed on June 20, 1967 by the law firm of Smith, Pepper, Shack and L'Heureux on behalf of various broadcast clients; a letter, dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967 to television station WCBS-TV; a "Petition for Reconsideration" and a "Petition for Immediate Stay of Effectiveness Pending Reconsideration by the Commission," filed on July 3, 1967 by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration, incorporating requests for stay, filed by The Tobacco Institute, Inc., *et al.* and WGN Continental Broadcasting Co., *et al.* on June 30, 1967 and July 3, 1967,

respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967 by American Broadcasting Companies, Inc. (ABC), National Broadcasting Company, Inc. (NBC), Storer Broadcasting Company, Griffin-Leake TV, Inc., *et al.*, the law firm of Dow, Lohnes and Albertson on behalf of 17 broadcast licensees, and the law firm of Pierson, Ball & Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967 by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a "Statement of Position by Federal Communications Bar Association" on July 27, 1967.[1] Requests for reconsideration have also been received from several Congressional sources.

A pleading in support of the Commission's ruling
815 has been filed by the complainant, John F. Banzhaf III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought.[2] Petitioners seek rule making on, and reconsideration and rescission of, a ruling in the Commission's letter of June 2, 1967 to television Station WCBS-TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67-641), and a stay of the effectiveness of the ruling pending action on their petitions.

2. Our ruling (FCC 67-641) was made on a complaint against Station WCBS-TV, New York, by Mr. John F. Banzhaf III, who asserted that this station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically, he noted three cigarette advertisements broadcast on November 24, 1966 over WCBS-TV

[1] In addition, the Commission has received various resolutions from state associations of broadcasters and numerous letters from the public.

[2] We do not find the arguments raised as to petitioners' standing persuasive.

which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS-TV setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS-TV showing of compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of five to ten minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS-TV is one for the licensee.

816 4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS-TV on the complaint

and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk non-compliance pending action on these pleadings lest their non-compliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling pending action on the petitions for reconsideration and rule making.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expeditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rule making in this area. The positions of the parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below,

it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rule making. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS-TV) in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this Memorandum Opinion and Order (which we shall also mail to all broadcast licensees) will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

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I. Petitioners' Arguments on the Merits

7. The principal contentions presented on the merits of the ruling are: (A) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (B) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (C) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to Congressional policy; (D) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (E) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health

hazard posed by smoking and the suggestion that a licensee might, *inter alia,* present a number of public service announcements of the American Cancer Society or the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (F) that the ruling cannot logically be limited to cigarette advertising alone; (G) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (H) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. *Constitutionality of Fairness Doctrine*

8. Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to
818 the Constitution incorporate by reference their comments to this effect in Docket No. 16574, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates.*[3] By a Memorandum Opinion and Order released on July 10, 1967 in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, we adhere to that deter-

[3] This contention is made by the NAB, the law firm of Pierson, Ball and Dowd, and WGN Continental Broadcasting Co., et al. The petition for rule making filed by Smith & Pepper states that it does not address itself to the question of whether *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, Case No. 19,938 (C.A.D.C., June 13, 1967), is good law.

mination here.[4] The Fifth Amendment challenge was also rejected in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, Case No. 19,938 (C.A.D.C., decided June 13, 1967), and we see no valid distinction in the circumstances of this matter.[5]

819 B. *Scope of Fairness Doctrine*

9. In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 F.R. 10415, and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a), limited the scope of the doctrine to programming of that nature since it

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[4] Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110-111; *Valentine* v. *Chrestenson*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Beard* v. *Alexandria*, 341 U.S. 622, 641-643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programming. See *Head* v. *Board of Examiners*, 374 U.S. 424, 436-431, 437-441 (advertising), and cf. *Farmers Union* v. *WDAY*, 360 U.S. 525, 529-530 (political broadcasts); *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A.D.C.), *cert. den.* 371 U.S. 821 (entertainment).

[5] Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see paras. 55-58, *infra*). The conduct of licensees prior to the publication of this Memorandum Opinion and Order will not be considered adversely when the question of renewal of license arises.

did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties state, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, *infra*, par. 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." H. Rept. No. 1069, 86th Cong., 1st Sess., p. 5; S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; Section 315(a); 1949 Report on Editorializing, 13 F.C.C. 1246, 1248-1249. That "one of the basic elements of any such operation" (13 F.C.C. at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 F.C.C. at 1249) as to "opposing positions on the public issues of interest and importance in the community" (13 F.C.C. at 1258) when the licensee is presenting programming in the nature of news, commentary on public issues or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his over-all duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. Section 315(a); 1949 *Report on Editorializing*, 13 F.C.C. at 1257-1258. Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section
820 did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's

statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; 105 Cong. Rec. 14439.[6] Most important, the amendment refers to the obligation imposed upon broadcast licensees ". . . *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in *Head* v. *Board of Examiners,* 374 U.S. 424, 437-441. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. See par. 13, *infra.*

12. The Commission has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given
821 in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Association* v. *Federal Radio Commission,* 47 F. 2d 670, 671 (C.A.D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases

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[6] Given the background to the 1959 amendments (see *Red Lion Broadcasting Company* v. *Federal Communications Commission, supra*), we are unable to see any significance in the fact that Congress did not also amend Section 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in Section 317 does not show a lack of Commission authority under the general provisions of the Act.

his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." *Id.*, at 671-672. The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457-459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also *WSBC, Inc.*, 2 F.C.C. 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." See 33 F.C.C. 101, 107 (1962).[7]

13. Mr. Justice Brennan, in his concurring opinion in the *Head* case, 374 U.S. at 439, noted that

> "... As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in the 'public interest.'"

The opinion also notes (n. 15) that

> "Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commis-

[7] As further administrative background in this area, see In re petition of Sam Morris, 11 FCC 197 (1946), where the Commission indicated the applicapability of the Fairness Doctrine to advertising in certain situations.

sion was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power 'through its power of regulation and its determination of public interest to handle objectionable advertising?' The
822 Chairman replied, 'I think so, Senator Dill, because we have had little trouble about it, even without direct power. * * *.'" *Hearings before Senate Committee on Interstate Commerce on S. 6,* 71st Cong., 1st Sess., pt. 6, p. 230.

See also *Hearings before Senate Committee on Interstate Commerce on S. 6,* 71st Cong., 1st and 2d Sess., pp. 88-89. The particular complaint leading to the General Counsel's opinion charged, *inter alia,* that "the object of this broadcasting is to transform 20,000,000 adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10,000,000 boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare and public health." Opinion No. 32, 1928-1929 Opinions of the General Counsel, Federal Radio Commission, 77, at 78 (April 15, 1929). General Counsel Bethuel M. Webster, Jr. concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to Section 11, and peti-

tioner's prayer for general relief will be granted." *Id.* at 82.

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined
823 at license renewal time (see 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation

adequately to inform the public as to the possible hazard.[8] See *infra,* paragraphs 30-32. Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

824 C. *Compatibility with the Cigarette Labeling Act*

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) preempted Federal, State and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of a health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising

[8] It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." *Pinellas Broadcasting Co.* v. *Federal Communications Commission,* 230 F. 2d 204, 206 (C.A.D.C.), *cert. den.,* 350 U.S. 1007.

with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

The Act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The Act also does the following: (1) makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above-mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than $10,000. (Sections 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State or local authority (Section 5(a)), and prohibits, for three years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (Section 5(b)); (3) states that the
825 Federal Trade Commission has no authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the Act, but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (Section 5(c)); (4) permits injunctions to be obtained to restrain violations of the Act, and provides an exemption for cigarettes manufactured

for export from the United States (Sections 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967 and annually thereafter: (a) the Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (b) the Federal Trade Commission concerning the effectiveness of cigarette advertising, current practices and methods of cigarette advertising and promotion, and recommendations for legislation.

16a. Section 5—the portion pre-empting Federal, State and local activity to compel health warnings in cigarette labeling and advertising—provides in subsection (b):

> No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act.

It is clear from the wording of this section that neither the F.C.C. nor the F.T.C. could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the F.C.C. or the F.T.C. cannot regulate in other respects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette"—i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect,[9] the House debate indicates that the F.T.C. is still free to regulate with respect to misleading or deceptive advertising concerning

[9] 111 Cong. Rec. 15597-15598 (1965).

smoking and health under Section 5 of the Federal Trade Commission Act.[10] For example, if an advertisement said that cigarette smoking was not a health hazard, the F.T.C. could act to prevent such advertising. The Chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the F.T.C., only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising.[11]

S26

See Section 5(c) of the Act. The F.C.C.'s regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that Act has on the F.C.C.'s authority in this field, particularly under the Fairness Doctrine.

Legislative History

17. The pertinent background to the 1965 Act is set out in Appendix A. We turn here to the relevant legislative history. Prior to 1964 a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's Report as a catalyst, many bills were introduced during the Second Session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) to require that cigarettes sold in interstate commerce be labeled with a health warning, and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R. 9693); (2) to confer on the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (H.R. 9655; H.R. 9657; H.R.

10 111 Cong. Rec. 16541-16544 (1965).

11 Remarks of Chairman Harris, 111 Cong. Rec. p. 16544 (1965).

9808; S. 2429); (3) to amend the Federal Food, Drug and Cosmetic Act so as to make that Act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1964 through July 1, 1964 before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of Congress had not permitted sufficient time for further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

827 19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) to amend the Federal Food, Drug and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the

House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Rept. No. 195, 89th Cong., 1st Sess., p. 3):

> While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
>
> The Commerce Committee, therefore, concurs in the judgment that "appropriate remedial action" is warranted.

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings. However, it did conclude that Congressional action should be taken with regard to the relationship of smoking and health. H. Rept. No. 449, 89th Cong., 1st Sess., p. 3.

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (*id.*, at p. 3):

828 The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all facets of

the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Rept. No. 195, 89th Cong., 1st Sess., p. 5):

> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the F.T.C. (H. Rept. No. 449,
829 89th Cong., 1st Sess., pp. 4, 5). The Labeling Act provides that the provisions which affect the regula-

tion of advertising shall terminate on July 1, 1969 (Section 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and F.T.C., it would re-examine the subject matter of the Labeling Act.

Conclusion

22. In light of the foregoing, it is our view that Section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the F.T.C. rule (see par. 7, App. A), but there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 F.C.C. at 1249):

> • • • the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. [Footnote omitted.]

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation. See par. 30, *infra*. On the contrary we believe that for reasons developed below,

our action is entirely consistent with the "comprehensive Federal program . . ." (Section 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the Act (see par. 21, *supra*).

830 23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising—a matter coming within Section 5(b) of the "preemption" portion of the Act. Rather it leaves to the good faith, reasonable judgment of the licensee—upon the facts of his situation—the matters of the type of programming, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, paras. 48-54, *infra*). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the Congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the Congressional purpose, and we shall of course adhere to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis

for Congressional action in the Labeling Act (*supra*, par. 21). Congress itself has affirmatively promoted such educational efforts by appropriating $2 million for use by HEW in this direction. P.L. 89-156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize and disseminate information on smoking and health, to provide encouragement and support for state and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking and health. The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain further coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, state, or local inter-agency advisory committees on smoking and health, which have worked to stimulate community interest in thirty-five states. As a result of this stimulus and others, the medical societies of at least 18 states have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health. For example, the California Medical Association has recently

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undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and statewide civic groups have also started public education efforts.

27. The Public Health Service and the United States Children's Bureau have directed a special education campaign aimed at school age children. To date, school programs on smoking and health reach about 70 percent of the school children in the United States. Forty states have developed materials on smoking and health for children or plan to do so, and twenty-seven states have either held conferences on smoking and health or intend to do so. In September 1966 a nation-wide program to discourage smoking among 7th and 8th graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 states.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained F.T.C. approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the F.T.C. determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 Cigarette Advertising Guides or of any provision of the law administered by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing technique.[12]

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12 New York Times, March 29, 1966, 53:6.

832 29. In October 1966 the Code Authority for the NAB issued the Cigarette Advertising Guidelines which they had announced during the 1965 Senate hearings would be forthcoming.[13] The main objectives of the guidelines are to restrict advertising appeals to youth and
833 statements concerning the health benefits of smoking. In January 1967, the Code Authority announced in a news release a slight change in the Television Code to strengthen its position as to appeals to youth. The Television Code, Section IX, General Advertising Standards, Par. 7, now reads:

> The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to youth that the use of cigarettes contributes to individual achievement, personal acceptance or is a habit worthy of imitation.

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13 *Text of the New Cigarette Advertising Guidelines*

Athletic Activity: A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion.

Tar and Nicotine Statements: Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters: Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker.

Uniformed Individuals: Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums: Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of Youth: Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

30. Considering these affirmative efforts by Congress, federal, state and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (Sections 5 (a) and (b), and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . . ." Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal program . . ." (Section 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the Congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communications Act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S.S. Co.* v. *Labor Board*, 316 U.S. 31, 47.

834 31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rule making with regard to advertising, promoting or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's Report was available and (Letter to Senator Magnuson, F.C.C. 63-1033):

> The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piece-meal fashion.

When the Advisory Committee's Report was issued and the F.T.C. had announced its rule making proceeding concerning cigarette labeling and advertising (see App. A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the F.T.C. had proposed and with activities of other interested agencies. FCC Letter to F.T.C. Chairman Dixon, FCC 64-29 (January 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC64-100) and his constituent, Mr. Sidney Katz (FCC64-99), then Chairman Henry answered a request to institute rule making proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting

that the Commission would await the results of the F.T.C. rule making proceeding before acting in this area. When asked to comment on S.2429, 88th Cong., and S.547 and S.559, 89th Cong., the Commission reiterated its policy that it favored "across-the-board treatment of the matter of regulating cigarette advertising and that since the F.T.C. had undertaken a comprehensive remedial regulatory plan, the F.C.C. had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S.2429, 88th Cong., FCC 64-730; Comments on S.559 and S.547, FCC 65-96.

835 32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The F.T.C., while proceeding in other respects consistent with the 1965 Act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the hazards of smoking. Third, we did not defer to the F.T.C. as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See *supra*, par. 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (paras. 33-34 and 60-62).

33. On July 12, 1967, HEW submitted its Report to Congress, which includes the Surgeon General's Report on

Current Information on the Health Consequences of Smoking. Upon the basis of more than 2000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening three and one-half years since the Advisory Committee's Report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 Report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking—1967, p. 2):

1. Cigarette smokers have substantially higher death rates and disability than their non-smoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable non-smokers.

2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.

836 3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.

4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin.

In releasing the Report, HEW Secretary John W. Gardner stated (HEW Press Release for July 13, 1967):

> The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.
>
> It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 percent of our population. We must do everything we can to encourage young people not to start smoking; at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed.

837 34. The June 30, 1967 Report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, p. 8). The FTC Report states (p. 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (p. 25); " '87.9% of teenage boys' and '89.5% of teenage girls hear radio on the average day' " (p. 13). The Report comments (p. 24):

> In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking.

The concluding paragraph of the F.T.C. Report states (p. 29):

> Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million (sic) of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story.

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the Congressional policy embodied in the Labeling Act—that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

838 D. *The Argument as to Blanket Ruling*

36. Petitioners further contend that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. But this argument misconceives the nature of the controversial

issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS-TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

> The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Petitioners point to no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk
839 (ibid.).[14] The Report supports this conclusion, more than adequately in our view, by a comprehensive

[14] The FTC Report states (p. 17) that an estimated 58% of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC Report, pp. 15-23). Numerous examples are given of the "satisfaction" theme (pp. 15-16)[15]; the "associative" theme (pp. 16-17)[16]; "appeals directed to
840 vanity" (pp. 17-18)[17]; subtle methods of "assuaging

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15 The Report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real", "true", "rich" or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh and/or refreshing ("coolest flavor," Lucky Strike Green; "forest-fresh taste . . . cooler tasting," Pall Mall; "as fresh as you like it," Philip Morris; "most refreshing coolness," Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (p. 16): "The impression forms that "menthol taste" relieves smoking irritation, albeit 'smoking irritation' is never expressly stated.

16 The Report states (p. 16) that associating cigarette smoking with persons, activities, places and things likely to be admired, respected or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, if not conducive to rousingly good health, is certainly not incompatible with it" (FTC Rept., p. 17). In addition, social events abound in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (*ibid.*). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); * * * picknicking (with Camel filters); and coffee klatching (with Winston filters)."

17 The Report gives as examples of appeals to vanity (pp. 17-18):
"*Be discriminating:* 'Particular about taste . . . I'm particular' (Pall Mall Kings); 'They like the style of this cigarette' (Parliament filters). *Be exclusive:* * * * 'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters). * * * 'the smokers who know' (Camel filters). *Be a success:* 'tastes rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters). *Be a social success:* "Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters). *Be independent:* 'break away from the crowd . . . the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem methols). *Associate with important people:* 'Chairmen are never bored with them' (Benson & Hedges filters); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

anxiety'' about any health hazard (pp. 19-21)[18]; the ''loyalty'' theme (pp. 15-16)[19]; and the ''bonus'' theme, which includes promoting longer cigarettes at pop-
841 ular prices as well as coupon promotions (pp. 22-23).[20] We note also the FTC's comment [21] (Report, p. 18):

> There is in all of the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include ''Salem Country,'' a land in which romantic couples romp and preen through shifting, sylvan set-

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18 The Report states that as a result of extensive promotion during 1957-1959, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (p. 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictorial details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton, Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke and Lark). Rept., p. 20. Other ''very low key'' advertising enhances the impression of relative safety by adding suitable adjectives to the word ''filter'': ''recessed filters'' (Benson & Hedges and Parliaments), ''white filters'' (Yorks), ''menthol filters'' (Springs) and filters with coconut shell charcoal'' (Philip Morris). *Ibid.*

19 See Report (p. 22). Underlying these ''loyalty'' theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., ''Change to Winston and change for good'').

20 The Report states (p. 23): ''The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morrises carry coupons redeemable for more cigarettes.'' The Report also gives examples of 100 millimeter cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (*ibid.*): ''With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100-millimeter cigarette campaign might be 'extra health hazard at no extra cost'.'' (footnotes omitted).

21 While we have, as petitioners point out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

tings; the "Night People," whose post evening encounters can lead to smoking Parliament filters; and "Marlboro Country," where there daily unfolds the simple male heroic virtues of the "Old West." Worry over health has been vanished from these Shangri-las.

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstance that cigarette adver-
842 tisers are precluded by various codes from making affirmative health claims in the advertising programming.[22] The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a

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22 We recognize also (as set forth in para. 29 above and Appendix A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC Report (par. 37 above) and the statistics and other matters set forth in paras. 33-34 and 60-61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. As the FTC Report notes (p. 8): "'They tend to view cigarette smoking as a visible mark of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit.'"

lawful product.[23] While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

843 E. *The Contention as to a Substitution of "Commission Fiat" for Licensee Judgment*

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally and a substitution of Commission fiat for licensee judgment. CBS, in particular, noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements, endlessly repeated

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23 NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the F.T.C. advertising guides permit presentation of enjoyment since they state:

> "Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programming and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programming poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programming. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous;" the complaint here went to advertisements broadcast daily for a total of five to ten minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the Act's basic policy of the "standard of fairness" (*supra*, par. 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This
844 consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death.

In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paras. 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we stated: "A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, and it was not intended as a "Commission fiat" as to the manner of compliance with the Fair-
845 ness Doctrine.[24] We stressed in the ruling, and here

[24] As set forth in par. 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

strongly emphasize again, that "in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See *Cullman Broadcasting Co.*, F.C.C. 63-849 (Sept. 18, 1963)."

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by *per se* guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time. Further, in these circumstances, while a one-to-one ratio is ruled out by considerations of the legislative history of the Cigarette Labelling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue—the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have not usurped licensee judgment as to the type of programming or the amount or nature of the time to be afforded, but rather have left these matters to the good faith, reasonable judg-

ment of the licensee based on his evaluation of the facts of his particular case.[25]

846 F. *Effect of the Ruling on the Advertising of Products Other Than Cigarettes*

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even common table salt. We do not find this "parade of horribles" argument impressive.

45. We stressed in our ruling that it was "limited to this product—cigarettes," stating further in this connection:

> Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Con-

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[25] It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and Governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side, over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

gressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

847 46. The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by

Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. *The Claim as to Adverse Financial Impact Upon the Broadcasting and Tobacco Industries*

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the Congressional intent underlying the Cigarette Labeling Act.

848 49. The contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven

of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the proceeding section of this opinion (*supra*, paras. 44-47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and the sale of cigarettes.

50. We have no reason to think, and petitioners have proffered nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal.[26] We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programming on the smoking-health issue which broadcast licensees are already presenting in the exercise of their

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[26] The FTC Report states (p. 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 percent in 1966). The Report also states (*ibid.*) that "in 1966, cigarette advertising accounted for approximately 7.2% of total television advertising expenditures."

judgment under the Fairness Doctrine and pursuant
849 to their obligation to operate in the public interest.[27] Rather, particularly in light of the consideration set forth above (par. 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant.[28]

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (See, e.g., §§ 73.111 and 73.112; see also Section 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as to advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area.[29]

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public

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27 In this connection, we note that many stations and the television networks (e.g., CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

28 Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broadcast stations to serve the public interest. Cf. also FTC Report of June 30, 1967 at p. 10.

29 We note that WCBS-TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under Section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the public interest. Nor does a cigarette manufacturer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pp. 4-7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with Congressional intent in, or the provisions of, the Labeling Act.

H. *The Procedural Contention*

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees

and it was adopted without affording WCBS-TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, F.C.C. Public Notice of July 1, 1964, 29 F.R. 10415, 10416, cited with approval in the *Red Lion* case, *supra,* par. 8). CBS requests that the contents of its letter be treated as its comments on
851 Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments.[30]

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS-TV initially was occasioned by our view that Mr. Banzhaf's complaint, which enclosed his request to WCBS-TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS-TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967 to that station had two purposes: One, to apprise WCBS-TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the

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[30] NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in para. 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

opposing viewpoint so that WCBS-TV could appro-
852 priately exercise its licensee judgment in connection with its continuing program. As stated in par. 6, *supra*, the effectiveness of the June 2nd ruling will not be the basis for action against any licensee, including WCBS-TV, until publication of this Memorandum Opinion and Order in the Federal Register. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS-TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see, e.g., *Cullman Broadcasting Company*, FCC 63-849; *Times Mirror Broadcasting Co.*, 24 R.R. 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of this opinion in the Federal Register. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate

the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rule making in this area, as requested by the law firm of Smith, Pepper, Shack and L'Heureux. We note that the petition for rule making does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rule making proceeding is either needed or appropriate for their resolution.[31]

853 59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely

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31 As set forth in par. 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to *per se* guidelines, ratios or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rule making to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see paragraph 43) and to conclude that rule making in this particular area would be appropriate and would serve a useful purpose.

death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW Report of July 12, 1967 (already discussed in par. 33 and since confirmed and amplified in its Report of August , 1967). We shall therefore note here other pertinent studies. In February 1966 Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of non-smokers.[32] In May 1966 Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments.[33] Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts
854 that none protects smokers.[34] A study by the Public Health Service and the American Cancer Society reported in October 1966 that a five year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population.[35] Also in October 1966, a Louisiana State University five-year study, financed partly by the Tobacco Research Council, reported findings of a relationship be-

[32] New York Times, February 23, 1966, 41:8.

[33] New York Times, May 2, 1966, 39:1.

[34] New York Times, August 30, 1966, 1:7.

[35] New York Times, October 12, 1966, 54:1.

tween cigarette smoking and hardening of the arteries in the heart.[36] Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer Institute, that "lung cancer—which will kill more than 50,000 Americans this year—can be brought under control because it is clearly caused by environmental factors—chiefly cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women."[37]

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966 the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption.[38] The reason given by the Surgeon General for the increase was new smokers, not the increased use of tobacco by the then-current smokers.[39] In July 1966 Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age eighteen, despite two and one-half years of intensive educational efforts.[40] In October 1966 the Rand Youth Poll, conducted by the Youth Research Institute, released findings that teenagers smoke ten million cigarettes per week, that 53 percent of all 16-19 year olds are smokers, and that this represents a rise of 4 percent in this age group during the almost three year period since the Advisory Committee's Report.[41] In November 1966 the American Cancer Society noted a six-year

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[36] New York Times, October 22, 1966, 20:2.

[37] The Washington Post, July 22, 1967, 2:1.

[38] New York Times, January 2, 1966, IV, 7:1.

[39] New York Times, January 11, 1966, 9:1.

[40] New York Times, July 17, 1966, IV, 10:1.

[41] Advertising Age, October 31, 1966.

study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise
855 in consumption by young people.[42] In December 1966 the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year.[43] In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (i) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (ii) that because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent F.T.C. Report (see par. 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see *Red Lion Broadcasting Company* v. *F.C.C. supra*). (Even in the event of such

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42 New York Times, November 3, 1966, 41:1.

43 New York Times, December 31, 1966, 4:6.

review, the ruling remains effective, absent entry of a Court stay.)

II *Conclusions*

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labelling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee
856 who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

a. The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

b. Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.

c. Petitioners have made no showing that relief, except as indicated in par. 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public.

ACCORDINGLY, IT IS ORDERED, That the petitions and requests for reconsideration, rule making, and stay listed in paragraph 1 of this Memorandum Opinion and Order ARE DENIED, except to the extent that relief is granted herein pending publication of this Memorandum Opinion and Order in the Federal Register.

IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order SHALL BE MAILED to all broadcast licensees of the Commission.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

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Appendix A
Background to 1965 Cigarette Labelling Act

1. On January 11, 1964 the Report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the Report was issued, many groups private and public acted to provide this "remedial action."

* See attached statements of Commissioners Loevinger and Johnson.

(a) *The Tobacco and Broadcasting Industries*

2. Soon after the Advisory Committee's Report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising.[1] In June 1964 similar amendments were approved for the Radio Code.[2] These Code amendments were motivated by the Advisory
858 Committee's Report. In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Cong., 1st Sess., pt. 1, p. 591):

> The board recognizes the burden of responsibility the report imposes on all television licensees in the area of cigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being.

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1 *Television Code, Section IV, Program Standards, Paragraph 12:*

Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation.

Television Code, Section IX, General Advertising Standards, Paragraph 7:

The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country.

2 *Radio Code I, Program Standards, Section H. 13:*

The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

Radio Code, Advertising Standards, Section C (g):

The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

The Code Authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the Authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. *Id.*, at p. 592.

3. In April 1964 the major cigarette companies announced their agreement and adherence to a cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (id., at p. 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code.[3]

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[3] However, we note the following exchange between Code Administrator Meyner and Senator Bass (id., at p. 581):

"*Senator Bass:* * * * don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

"Code Administrator Meyner: I think you describe a responsibility that is greater than is set forth in the code. As the code sets it forth, I am trying to accept that responsibility . . ."

859 (b) *HEW and Private Health Agencies*

4. The Department of Health, Education and Welfare (HEW) also took action after the Advisory Committee's Report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee Report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are threefold: "(1) to use its professional talents to bring to the nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support and assist National, State and local smoking and health programs, and (3) to generate and coordinate public interest and action related to this area of health." The membership of the Council includes thirteen private agencies and three Federal Government agencies (United States Public Health Service, United States Office of Education, and United States Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's Report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 89th Congress. The President's Commission of Heart Disease, Cancer and Stroke recommended an appropriation of $10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

(c) *The Federal Trade Commission*

6. As early as September, 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking, or which made unsubstantiated claims respecting nicotine, tars or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (F.T.C. Ann. Rept., 1960, p. 82). In 1960 the F.T.C. obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (*Ibid.*).

7. Shortly after the issuance of the Advisory Committee's Report the F.T.C., on January 18, 1964, initiated a Trade Regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining the advertising, labeling and other promotional practices in the cigarette industry, the F.T.C. concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 F.R. 8325). The basis for its conclusion was twofold. First, the F.T.C. found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the F.T.C. found that methods by which cigarettes had been and were being sold to the consuming public—by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking—were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warnings on the package together with such voluntary advertising reforms as the industry might have undertaken in

the interim, had failed to change the circumstances leading to the F.T.C.'s findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the F.T.C. extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 F.R. 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his Committee's Hearings in June and July, 1964 indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The F.T.C. rule never went into effect because Congress enacted the Cigarette Labeling Act.

861 **Concurring Opinion of Commissioner Lee Loevinger**

In the Matter of Cigarette Advertising Ruling

* * * *

I concur with great doubt and reluctance in the Commission ruling that broadcast licensees presenting cigarette advertising must also present warnings of the health hazards of cigarette smoking. I concur because the result seems to me to be socially and morally right. I have doubts that the action is procedurally and substantively consistent with controlling legal rules. I am reluctant because of concern that this action may represent a subjugation of judgment to sentiment. Briefly these are my views.

Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smok-

ing is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of government agencies, and by Congressional reports and statute. 15 USC sec. 1331 et seq. The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. See Loevinger, Science and Legal Thinking, 25 Fed. Bar J. 153 (Spring 1965). Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. In an ordinary civil case or administrative proceeding a mere preponderance of the evidence is sufficient to carry the day. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt. This is the basic premise of my position, as well as of the Commission position despite a rather feeble disclaimer that the Commission is not passing judgment on this issue. (par. 62)

However, a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point.

The Commission here was so eager to take its present position that it acted on a complaint against CBS without giving notice to CBS, without affording CBS the opportunity to comment or submit a statement to the Commission directed to the issues under consideration, and without even bothering to secure or examine the text of the advertisements in question. Surprising though it may seem to those unfamiliar with administrative agencies, the Commission was not aware of these irregularities at the time of the initial ruling, and how they occurred is more significant as a study of administrative

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efficiency than as an issue of due process. It is enough to say that were the issue before us now merely the validity of the original letter to CBS these procedural defects would plainly invalidate the action.

However, what the Commission is doing now is issuing a prospective, legislative-type rule relating to cigarette advertising and broadcasting. CBS has been entirely exonerated from any imputation of unfairness in its broadcasting regarding cigarettes. That ends the proceeding so far as CBS is concerned; so the absence of due process in handling that complaint is no longer significant. In its present action the Commission is exercising its quasi-legislative authority to make a prospective rule. It is acting on the material that has been submitted to it since the original letter to CBS, so it has before it a variety of differing views from many interested parties. I think it would be preferable to have oral argument on the proposed rule to give the Commission the advantage of the interchange and confrontation between advocates of opposing views, and to permit the exploration of issues by direct questioning. But the refusal to hold such oral argument is not fatal and does not preclude legislative-type action.

Despite the reiterated certainty of the Commission opinion, doubts remain as to the legal authority of the Commission. Repetitious reference to the "public interest" as establishing whatever conclusion is contended for is no more than question-begging. The "public interest" is a judgment encompassing whatever the person making the judgment deems to be socially desirable. See dissenting opinion in Regulation of CATV Systems, 6 FCC2d 309, 330, at 335 et seq. (1967); Loevinger, Regulation and Competition as Alternatives, 11 Antitrust Bulletin 101, 129 et seq. (1966); Schubert, The Public Interest (1960). The Commission believes, and I concur, that it is socially desirable to discourage, rather than encourage, smoking by people, especially young people.

But the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e. "in the public interest"). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite statutory basis.

The Commission opinion rests the present action on the Fairness Doctrine. This is a rule that broadcast licensees must afford reasonable opportunity for a discussion of conflicting views on issues of public importance. This principle was first developed on the basis of the statutory licensing power as to broadcasters, Editorializing by Broad-
863 cast Licensees, 13 FCC 1246 (1949), and was recognized by reference in a 1959 amendment to section 315. 47 USC sec. 315. The context of both sources refers to "news" and the basic Commission opinion also refers to "commentary" and "discussion of public issues". Neither contains the slightest suggestion that the principle has anything to do with advertising, and that conclusion is most dubious.

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the "normal use" of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. The Com-

mission will also find itself embarrassed when, as will surely happen, the cigarette companies demand time from some broadcaster who refuses to carry cigarette advertising but presents "public service messages" warning against the dangers of cigarette smoking. Having declared this to be a "controversial issue of public importance", the Commission will be bound to require that the viewpoints of those manufacturing and selling cigarettes are afforded access to broadcasting facilities.

The Commission opinion does contain findings that might support the result reached. Paragraph 37 finds that cigarette advertising expressly represents smoking as desirable and implicitly represents that it involves "relative safety" or "relatively little risk". This finding is corroborated by common experience and by scientific investigation. See Preston, Logic and Illogic in the Advertising Process, 44 Journalism Q. 231 (Summer 1967). In view of the clear weight of scientific evidence and official findings on this subject, this means that cigarette advertising constitutes both implicit misrepresentation and concealment of a material fact, if the health hazards are not disclosed by the seller. It is elementary law that the supplier of a chattel is bound to disclose its latent dangers to prospective users. Restatement of the Law, Torts 2nd, sec. 388. There is sound statutory and precedential authority for Commission action to prevent false representations on the broadcasting media. 18 USC sec. 1343; KWK Radio, Inc., 34 FCC 1039 (1963), 111 AppDC 144, 337 F2d 540 (1964), cert. den. 380 US 910 (1965); Loevinger, The Issues in Program Regulation. 20 FCBA J 3 (1966).

864 The normal remedy for such misrepresentation or concealment would be either to forbid the advertising altogether or to require that it carry adequate disclosure of the material facts. There are two reasons precluding such Commission action. First, the Commission has no authority over advertisers as such. Second, the 1965 Cigarette Labeling Act apparently forbids such action.

The first reason is easily surmounted. The Commission has held that a broadcast licensee must take reasonable measures to prevent the use of his licensed facilities for public deception. KWK Radio, Inc., supra. The application of this principle to the present situation suggests a means of achieving the result reached here within the limits of statutory authority and without doing violence to the Fairness Doctrine. The second reason is more difficult.

The Commission opinion recognizes the Cigarette Labeling Act as a substantial argument against the present action, since it devotes a large part of the discussion to it. (pars. 15 through 35 and Appendix A). By reading the terms of the Act very literally and the presumed purposes of the Act very loosely, the opinion concludes that the present ruling is not precluded by the Act but rather implements the policy of the Act. The opinion offers a mass of detail in support of this conclusion, but a review of the relevant points casts some doubt. In several messages to Congress prior to passage of legislation on this subject and during consideration of such legislation, the FCC stated that its authority is limited to the broadcasting field and that it believed that cigarette advertising should be regulated on a "broad, across-the-board basis". (par. 31). After receiving several such messages from the Commission, Congress in 1965 passed an act expressly stating: "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, * * *" 15 USC sec. 1331. This was clearly the "broad, across-the-board" regulation which the FCC had suggested, and Congress surely was warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a "piecemeal" attack upon the problem.

Nevertheless, the Commission opinion argues that FCC action is not precluded for several reasons. The opinion says that conditions have changed because the FTC is not

undertaking the comprehensive regulatory plan which it formerly proposed. (par. 32). But the reason for this is that the FTC plan was expressly forbidden by statute, and thus the only change in circumstance is the passage of the statute which limits, rather than extends, administrative authority to act in the field. The opinion also concludes that the terms of the Cigarette Labeling Act do not prohibit the present ruling because the Act refers only to statements made "in advertising" and not to statements made "because of the advertising" of cigarettes. (par. 16a, 23). However, the Act prescribes the form of health warning that is required on cigarette packages and explicitly provides that no other statement relating to health and smoking shall be required on cigarette packages or in cigarette advertising. If the Act is read as literally as the Commission opinion construes it, then it does not preclude the total prohibition of cigarette advertising, either altogether or in the broadcasting media. The opinion states that this would be inconsistent with the Act (par. 15) although there is no specific provision of the Act relating to this, any more than there is a specific provision relating to statements to be required "because of" cigarette advertising. The Commission opinion does not explain why the Act is construed to permit one remedy but not another for misleading advertising, when neither is explicitly covered. Despite the profusion of detail and the length of the discussion the opinion does not come to grips with the issue posed by the Cigarette Labeling Act. The real reason for the Commission's present action is that during the last several years the Commission has changed its "policy"—that is, its collective opinion—on this subject and now believes that it should take whatever action it can take to combat the health hazard of smoking, especially by young people who are likely to be influenced by the broadcast media.

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It seems to me that the construction of the Cigarette Labeling Act attempted in the Commission opinion is

strained and unconvincing. However, the basic difficulty is that Congress was obviously ambivalent on this subject and that there is no unequivocally clear Congressional intent to be derived from the Act or its history. It was a compromise between conflicting viewpoints which still have spokesmen who are heard in Congress.

I am as persuaded as the Commission majority and its draftsmen that cigarette smoking is hazardous and injurious to the health of smokers and extremely hazardous and injurious to the health of those who start smoking while young. Therefore I think it desirable that all legal and practical steps be taken to discourage smoking. I have serious doubts that the action taken now by the Commission is legally sound or practically effective. I think that if we spent less effort and space in proclaiming the righteousness of our purposes and objectives and more in careful and rigorous analysis of our procedures and of our legal jurisdiction and authority, and attempted greater specification of the scope and application of our ruling, we would be more convincing and more effective.

866 Consequently, I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the light of present knowledge, is something very close to wickedness.

867 **Fairness and Cigarette Advertising**

[In the Matter of Television Station WCBS-TV. . . .]

Concurring Opinion of Commissioner Nicholas Johnson

I join the Commission's decision to apply the Fairness Doctrine to the use of television and radio broadcasting to promote cigarette smoking. In view of Commissioner Loevinger's concurring opinion, however, I believe some brief remarks are appropriate.

With admirable honesty, Commissioner Loevinger has confessed to "doubts and reluctance" about our cigarette ruling. The issues he raises are provocative and significant. They touch on concerns which are, I believe, widely shared by members of the public. They inspire qualms about a case of landmark importance. I consider these doubts unwarranted.

Commissioner Loevinger does not state flatly that he thinks the ruling unlawful. But he does cast grave doubt on its validity, for his dismissal of a number of arguments against the Commission's position displays something less than full enthusiasm. For this reason, I feel obligated to set forth the simple logic behind my support for the decision.

The decision takes as its major premise a factual assertion which is so trivial as to be beyond cavil. Advertising
868 messages are part—an important and substantial part—of the information put before the public by television and radio broadcasting. Roughly one-third of radio's hour is spot commercials. As such, advertising messages should no more be granted automatic immunity from considerations of fairness than any other category of advocacy. If an advertisement takes a position on an issue that is "controversial" and of "public importance" then fairness—whether as a matter of Section 315, FCC regulations, or common decency—requires that an opportunity be granted to ventilate opposing views. Com-

munications Act of 1934, as amended, 47 U.S.C. § 315(a)(4) (1964). Federal Communications Commission, Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

The Commission's minor premise seems equally hard to question. The issue of whether people ought to smoke cigarettes is a "controversial" issue, and it is one of "public importance." It has been recognized as such by Congress, the Executive Branch, the Federal Trade Commission as well as the FCC, the scientific and educational community, and the mass media. Millions of Americans smoke. Commissioner Loevinger agrees with the by now quite impressive evidence that they thereby incur grave risks of impairing their health and shortening their lives.
869 Broadcasters licensed by this Commission to serve the public interest devote significant amounts of their prime time to encouraging Americans to incur those risks. Given this set of circumstances, it is the minimum obligation of this Commission to see to it that a fair opportunity exists to present the other view: the warnings of those responsible citizens who believe cigarette smoking to be a dangerous and insidious habit.

Commissioner Loevinger does not explicitly dispute this line of reasoning. But he cautions against such an interpretation of the Fairness Doctrine by advancing what lawyers call a "slippery slope" argument. If the Commission brands cigarette advertisements controversial issues of public importance, he says, virtually all advertising will be covered by the logic of that decision. No one will know where to draw the line. Now, it is certainly true that it is no easy matter to decide what is and what is not a controversial issue of public importance. But that difficulty is one with which the Commission must live, *whenever* it confronts a fairness case. The fact that this particular case happens to involve paid commercial announcements does not make it unique in that respect. The slippery

slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable, cases. Of course, this is right. This decision *could* be extended to other situations. But the fact is that all the hypothetical cases brandished by Commissioner Loevinger *are* more questionable than this one. By drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began.

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Finally, Commissioner Loevinger broaches the argument that Congress may have intended to preclude FCC regulation of cigarette advertising when it passed the Cigarette Labeling Act. With all respect, I consider such a sweeping intrepretation of that statute (which Commissioner Loevinger himself seems disinclined to accept) altogether misguided. It seems to me to reflect a very limited view of the relationship between particular Congressional actions and administrative agencies charged with enforcing established public policies of great significance.

This Commission has few, if any, responsibilities to the people of America greater than its duty to ensure that its licensees act consistently with the dictates of the Fairness Doctrine. That doctrine ensures that the most powerful medium of mass communication in our society does not stifle competition in the market place of ideas. Had the Congress and this Commission not written this doctrine into statutory and regulatory prescription, early in the history of the Communications Act of 1934, the Supreme Court might well have felt obligated to make the requirements of fairness a matter of constitutional law. For fairness plainly deals with issues of constitutional dimension.

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In view of the stature of the Fairness Doctrine, we would be underestimating our obligations as members of this

Commission if we concluded that the Cigarette Labeling Act tied our hands in the present case. I agree with the Commission that our action here is entirely consistent with the regulatory design created by that Act. But even if I shared Commissioner Loevinger's conclusion that the Act is ambiguous, it would not alter my view of this issue. Elemental principles of public law dictate that forces within the legislature cannot override a major national policy, unless they persuade a majority of the legislature to inhibit the application of that policy with clarity if not explicitly. In plain political terms, if there was "ambivalence" it means that a majority of Congress did *not* state an intention to immunize the advocacy of cigarette smoking from the requirements of the Fairness Doctrine. Thus, the Commission's obligation to apply that doctrine according to its inherent logic remains in force.

In conclusion, I would like briefly to express my personal regret at the seeming reluctance of some broad-
872 casters to accept the spirit of the fairness doctrine and this ruling. There is no social force more powerful than broadcasting today. If popular support is to be sustained for industry programming relatively unfettered by governmental restraint—which I encourage—the broadcasters must not only act responsibly but appear to act responsibly. Nothing contributes more to the appearance as well as the reality of responsible broadcasting than the Fairness Doctrine, and the FCC's enforcement of that doctrine. The broadcaster need not withstand alone both the charge that he has been unfair and that he has been unilaterally irresponsible in the self-evaluation of others' charges of his unfairness. He can point to the FCC, its procedures for evaluating such complaints, and its judgments on his behalf. Indeed, if the Fairness Doctrine and procedures did not exist I would think the broadcasters would be the first to urge their creation.

Note that, for a variety of reasons, the FCC has not banned cigarette advertising from broadcasting. Our ac-

tion today simply requires broadcasters—public licensees charged with operating "in the public interest"—to afford opportunity for fair response to the appeals of cigarette commercials. It is a mild form of regulation. It will have little, if any, impact on the advertising revenues of station owners and networks. It will increase the amount of public service time for which they may take credit.

873 Unfortunately, it will probably also do little to brake the still-climbing rate of cigarette consumption by Americans, especially our young people—who see, on the average, at least one television program every day sustained by commercials associating cigarette smoking with adulthood and other goals of youth. FTC Commissioner Elman has estimated that some 300,000 Americans die prematurely each year because of their affection for cigarettes. Given these facts I should think broadcasters would want to give far more serious consideration than they have to a voluntary ban on the carriage of cigarette advertisements.

For, once again, it is the appearance as well as the reality that moves men's souls. And, unfortunately from the standpoint of the broadcasters' relations with their public, broadcasting's encouragement of cigarette consumption is an issue wrapped in profits as well as propriety—indeed, roughly $200 million of advertising revenues a year. For, whether or not the judgment be warranted, association with profitable enterprise dependent upon the promotion of disease, death, dismemberment or degradation of one's fellow man—especially children—has historically been viewed in most human societies with even less charity than the senseless criminal act which produces the same end.

874 It is true that $200 million is not an insignificant amount of money voluntarily to forego. But, especially if its loss is ultimately inevitable anyway, it may be far cheaper in the long run to gain the goodwill of voluntary forebearance than to risk forever tainting the good name of American broadcasting.

882 FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 67-1074
5284

September 21, 1967

IN REPLY REFER TO:
3300

Mr. Thomas J. Dougherty
Assistant Secretary
Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

In re: Applicability of the Fairness Doctrine to Cigarette Advertising (RM-1170)

Dear Mr. Dougherty:

This is in response to your letter of September 15, 1967, seeking clarification of one aspect of the Commission's recent ruling on the applicability of the Fairness Doctrine to cigarette advertising (FCC 67-1029). Specifically, you inquire whether the presentation of health hazard programming, in line with the Commission's ruling, in turn gives rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming, and in this connection request clarification of paragraph 38 of our September 8 ruling, and specifically the following sentence: "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials."

In accordance with your request, we shall clarify this matter. The sentence quoted in your letter states our position inaptly and is withdrawn.

In the Editorializing Report, 13 FCC 1246, 1249, where the Fairness Doctrine is spelled out, we pointed out the licensees should devote a reasonable amount of time to the discussion of controversial issues of public importance to their area. Thus, tobacco organizations are, and have always been, free to approach broadcast licensees to purchase regular programming time or suggest sustaining roundtable or other programs to deal intensively with the issue of smoking and health, on the ground that it is one of importance to the licensee's area. Whether such
883 time is to be afforded is a matter within the discretion and judgment of the licensee, as in the case of other similar programming judgments.

Your inquiry assumes that cigarette companies have purchased time on a station to present their commercials. We have held that these portray the use of the particular cigarette as attractive and enjoyable and encourage people to smoke. We said (para. 37):

> The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid.) . . .

A licensee may choose to present regular programming dealing with the cigarette smoking issue, (e.g., roundtable discussions or documentaries), in discharge of its fairness obligation. See para. 42, FCC 67-1029. But in view of the above, it follows that whatever way is chosen (i.e., regular programming or health hazard announcements), a

licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesmen in your assumed case. Rather, in the circumstances, whether time is afforded for the presentation of such additional material by these companies is a matter within the discretion of the licensee in determining whether further discussion of the "pros and cons" of this issue is called for.

884 We hope that the foregoing general material clarifies this matter and will be helpful to you. Any specific ruling would of course be made only in the context of a particular factual situation.

By Direction of the Commission
Ben F. Waple
Secretary

Concurring Statement of Commissioner Lee Loevinger

I concur in deletion of some inapt and unfortunate language from the Commission opinion of September 13, 1967, regarding cigarette advertising. However, since the Commission opinion is confused, ambiguous, loosely reasoned and certain to engender difficulties, as stated in my concurring opinion of that date, I think it would be preferable to withdraw the Commission opinion and issue one less prolix and logically more rigorous to deal with this subject.

WASHINGTON, D.C. 20554

The Tobacco Institute, Inc.
1735 K Street, N.W.
Washington, D. C. 20006

Attention: Mr. Franklin Dryden

Dear Mr. Dryden:

This is in response to your letter of October 20, 1967, petitioning for reconsideration of the Commission's letter of September 22, 1967 to Metromedia, Inc. (FCC 67-1074), in response to Metromedia's request for clarification of the Commission's Memorandum Opinion and Order of September 8, 1967 (FCC 67-1029) on the applicability of the Fairness Doctrine to cigarette advertising. Metromedia had inquired whether the presentation of health hazard pro-

gramming, in line with the Commission's ruling, in turn gave rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming.[1] The Commission's letter to Metromedia clarified the matter by stating, in essence, that "* * * a licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesman in your assumed case."

Asserting that the Commission's letter (FCC 76-1074) represented a "major substantive change" in the September 8th Order, rather than a clarification, you claim that all interested parties should have been notified and given an opportunity to present their views. You also assert that there is no basis for the Commission's decision that cigarette commercials contain health claims, and further that stations which carry health hazard claims and no cigarette advertising are obliged to present pro-smoking material.

897 Notwithstanding your contention, we believe that our letter to Metromedia did not constitute the type of action for which prior notice and an opportunity to comment was necessary or warranted. There was no complaint submitted in this matter nor any case or controversy before the Commission for determination, but simply a request by Metromedia for an explanation as to the intended meaning of one paragraph in our September 8th opinion. Nothing in the Commission's rules or in its procedures as to complaints under the "Fairness Doctrine"

[1] In requesting clarification Metromedia pointed specifically to a sentence in para. 38 of the September 8th Memorandum Opinion and Order, and the Commission withdrew that sentence for the reason that it "states our position inaptly."

requires that public notice be given prior to answering a request for clarification. In any event, our September 22nd letter to Metromedia was less than 30 days after our Memorandum Opinion and Order of September 8th, and therefore within the time period for reconsideration on the Commission's own motion. Public Notice of the letter was given (32 F.R. 13737), and any interested person could properly seek reconsideration of the substance of our letter.

With respect to your substantive objections, the contention that cigarette commercials do not make any health claim was fully treated in our September 8th Memorandum Opinion and Order and in the September 22nd letter to Metromedia. We think further comment is unnecessary.

The hypothetical situation of a station which presents health hazard claims but no cigarette commercials obviously raises a factor different from that considered in our response to Metromedia, whose inquiry assumed that cigarette commercials had been carried. Whether time must be afforded in the hypothetical circumstances you suggest is a matter which would be governed by the same principles as are applicable generally under the "Fairness Doctrine."

In sum, we think that your letter does not present any arguments which warrant reconsideration of the letter to Metromedia. Accordingly, your request for reconsideration is denied.

By Direction of the Commission

Ben F. Waple
Secretary

APPENDIX B

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,285

JOHN F. BANZHAF, III, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

WTRF-TV, INC. and NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN BROADCASTING COMPANIES, INC., THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS TOBACCO CO., PHILIP MORRIS, INC., R. J. REYNOLDS TOBACCO CO., UNITED STATES TOBACCO CO., P. LORILLARD CO., *Intervenors*

Nos. 21,525 & 21,526

WTRF-TV, INC. and NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

HEART DISEASE RESEARCH FOUNDATION, SPARTAN RADIOCASTING CO., PALMETTO RADIO CORP., W.A.V.E., INC., WFIE, INC., and WFRV, INC., INDIANA BROADCASTING CORPORATION, GULF TELEVISION CORPORATION, CORINTHIAN TELEVISION CORPORATION, GREAT WESTERN BROADCASTING CORP., COLUMBIA BROADCASTING SYSTEM, INC., WLLE, INC., NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS TOBACCO CO., PHILIP MORRIS, INC., R. J. REYNOLDS TOBACCO CO., UNITED STATES TOBACCO CO., P. LORILLARD CO., JOHN F. BANZHAF, III, *Intervenors*

No. 21,577

THE TOBACCO INSTITUTE, INCORPORATED, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents*

On Petitions for Review of Orders of the Federal Communications Commission

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Decided November 21, 1968

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

BAZELON, *Chief Judge:* In these appeals we affirm a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. This holding rests on negative answers to the following principal questions:

(I) whether in the Cigarette Labeling Act of 1965 Congress preempted the field of regulation addressed to the health problem posed by cigarette smoking so as to deny the FCC any authority it otherwise had to issue its cigarette ruling (*infra,* pp. 9-15);

(II) if not so forbidden, whether the ruling is nonetheless unauthorized (*infra,* pp. 15-30), either

(A) because the Commission has no authority to regulate broadcast content (*infra,* pp. 19-24), or

(B) because any authority over program content which the Commission may have cannot support a ruling of this kind (*infra,* pp. 24-30); and

(III) if neither forbidden nor unauthorized, whether the ruling is unconstitutional (*infra,* pp. 30-37), either

(A) because the First Amendment permits no regulation of program content (*infra,* pp. 31-33), or

(B) because the cigarette ruling in particular violates the First Amendment (*infra,* pp. 33-37).

The history of the cigarette ruling dates to December, 1966, when citizen John F. Banzhaf, III asked WCBS-TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast.[1] Although he cited several specific commercial messages, Banzhaf's target included

> all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] . . . facilities available for the expression of contrasting viewpoints held by responsible elements. . . ."

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service

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[1] Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

announcements of the American Cancer Society aired free of charge during recent months.[2] On the basis of these broadcasts it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. . . ."

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine.[3] And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. In a letter dated June 2, 1967,[4] it agreed that the cited cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life,' "[5] and, as such, invoke the fairness doctrine. It said in part:

> We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and congressional action [1] (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe

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[2] Letter from Clark S. George, Vice-President and General Manager, WCBS-TV to John F. Banzhaf, III, December 30, 1966.

[3] Letter from John F. Banzhaf, III, to Federal Communications Commission, January 5, 1967.

[4] Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967).

[5] *Id.*

that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[6]

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee . . . ." But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. . . ." And by way of illustration it suggested they might discharge their responsibilities by presenting "each week . . . a number of the public-service announcemnts of the American Cancer Society or HEW in this field."[7]

In response to numerous petitions and requests for reconsideration, the Commission affirmed its ruling in a lengthy Memorandum Opinion.[8] It rejected contentions that the fairness doctrine is unconstitutional and that the cigarette ruling is precluded by the Cigarette Labeling and Advertising Act of 1965. The opinion did make clear that cigarette advertising *in general,* not any particular commercials, necessarily conveys the controversial view that smoking is

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[6] *Id.* at 381-82.

[7] *Id.* at 382. The Commission noted WCBS's public service programming in this area, see text at note 2 *supra,* but said "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." *Id.* at 383.

[8] Television Station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 F.C.C. 2d 921 (1967), hereinafter cited as "Cigarette Advertising."

a good thing.[9] But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance."[10] While defending its failure to provide interested persons an opportunity to be heard before issuing its ruling, the Commission emphasized that any procedural lapse was cured by its exhaustive consideration of the many petitions for review. Finally, it concluded that, "the specifics of the Fairness Doctrine" aside, its ruling was required by the public interest.[11]

Subsequently, in response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.[12]

In this review proceeding, the Commission is challenged at virtually every point. Mr. Banzhaf complains that the anti-smoking forces should have been granted equal time. Petitioners Station WTRF-TV, the National Association of Broadcasters, The Tobacco Institute, and eight cigarette manufacturers (hereinafter "petitioners"), all of whose

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[9] The Commission explained that it could make its ruling without having before it the text of the particular commercials cited in Banzhaf's complaint, because the controversial issue was not whether smoking is dangerous to health but whether it is desirable. *Id.* at 946 n. 30. *And see id.* at 939. The Commission said it had been cited to "no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke," and found it "difficult to conceive of one [which would not do so]." *Id.* at 938.

[10] *Id.* at 943.

[11] *Id.* at 949.

[12] Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C. 2d 16 (1967).

appeals have been consolidated, complain of almost everything else. They are supported by Intervenors CBS and NBC-ABC-WLLE Inc. The Commission is supported by the interventions of the American Tuberculosis Association and the ubiquitous Mr. Banzhaf.

We turn now to the issues these legal armies present for our consideration.

I. The Cigarette Labeling Act

We are confronted at the outset by the contention that the Commission's action is precluded by the Federal Cigarette Labeling and Advertising Act of 1965.[13] That Act requires cigarette manufacturers and importers to print on each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" and provides that

> no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[14]

Since the Commission's ruling does not require the inclusion of any "statement . . . in the advertising of any cigarettes," but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.

But petitioners contend that, though Congress said only "no statement shall be required . . . in . . . advertising," it meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading

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[13] 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39 (Supp. 1966).

[14] Federal Cigarette Labeling and Advertising Act of 1965 (hereinafter "Act") § 5(b), 15 U.S.C. § 1334(b) (Supp. 1966).

advertising.[15] In support of this proposition, they refer us primarily to the Act's Declaration of Policy, in which Congress asserts a purpose to

> establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[16]

From this declaration and from assorted snippets of legislative history, they conclude that Congress has definitively balanced the conflicting interests of the health of the public and the health of the economy and determined—in effect as a matter of law—that the public will be "adequately informed" on the smoking-and-health issue until July, 1969,[17] without any further governmental requirements.

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[15] Section 5(c) of the Act states:

> Except as is otherwise provided . . ., nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes . . . .

15 U.S.C. § 1334(c) (Supp. 1966).

[16] Act, § 2, 15 U.S.C. § 1331 (Supp. 1966).

[17] Section 10 of the Act provides that the provisions "which affect the regulation of advertising" shall terminate on July 1, 1969. 15 U.S.C. § 1339 (Supp. 1966).

The Commission, on the other hand, thought its ruling implemented a congressional policy of promoting intensive smoker-education during the life of the Act as an alternative to the "drastic step" of requiring warnings in every cigarette advertisement. Its opinion cites the express reliance in both House and Senate Reports on the anti-smoking campaigns of public and private groups as a reason for deferring stronger Congressional action.[18] And it notes that Congress itself appropriated $2 million to fund the extensive informational activities in this area of the Department of Health, Education and Welfare.[19]

This evidence does not establish unequivocally that Congress did not intend to rely exclusively on such non-coercive educational efforts to inform the public. Congress expressed no purpose in the Act of informing the public of anything except the bare fact that "cigarette smoking may be hazardous to health." Its prescribed warnings do that much and no more. They merely flash danger signals without either particularizing the danger or providing facts on which it may be appraised.

But the anti-smoking campaigns are scarcely so pervasive or so well-funded that additional information could be

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[18] The Senate Commerce Committee concluded:

> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

S. Rep. No. 195, 89th Cong., 1st Sess., p. 5 (1965). *See also* H.R. Rep. No. 449, 89th Cong., 1st Sess., pp. 4-5 (1965).

[19] Cigarette Advertising, *supra* note 8, at 933.

regarded as mere surfeit. Accordingly, if we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.

In the present case we find no such clear expression of restrictive intent. On the contrary, there are positive indications that Congress's "comprehensive program" was directed at the relatively narrow specific issue of regulation of "cigarette labeling and advertising." The Act was in fact passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising.[20] Subjected to competing pressures and uncertain of the full extent of the health hazard, Congress apparently settled on half of the FTC's proposed loaf, shelved the other half for four years,[21] and expressly disclaimed any intent to affect other FTC policies

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[20] On June 22, 1964, the Federal Trade Commission promulgated a proposed regulation requiring warnings on cigarette packs from January 1, 1965, and warnings in advertising as well from July 1, 1965, unless the package warnings and voluntary advertising reforms had changed the circumstances by then. 29 Fed. Reg. 8325 (1964). The next day the House Commerce Committee began hearings on various cigarette legislation which had been introduced in the House during the 88th Congress. Those hearings and that Congress adjourned without action, but the FTC acceded to the request of Chairman Harris to postpone the effective date of the package-warning rule to July 1, 1965, so that the new Congress might legislate. 29 Fed. Reg. 15570 (1964). The 89th Congress rushed into the breach with the Cigarette Labeling Act, and as a result the FTC rule was stillborn.

[21] See Act, § 5(b), text at note 14, *supra;* § 10, *supra* note 17.

or powers.[22] Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies—much less that it specifically meant to foreclose all such regulation.[23] If it meant to do anything so dramatic, it might reasonably be expected to have said so directly—especially where it was careful to include a section entitled "preemption" specifically forbidding designated types of regulatory action.[24]

In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning*.[25] It surely did not think the warnings were them-

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[22] Act, § 5(c), *supra* note 15.

[23] The only reference to other agencies besides the FTC in the entire Act is the declaration in Section 10 that the termination in 1969 of the provisions affecting the regulation of advertising "shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of the enactment of this Act." 15 U.S.C. § 1339 (Supp. 1966). Since all other agencies are necessarily included in the blanket ban on required warnings in advertising, this negative provision is not evidence that the Act sweeps more broadly than its words import.

[24] Act, § 5, 15 U.S.C. § 1334 (Supp. 1966).

[25] Too many bare warnings might result in an uninformed and possibly unnecessary stampede away from cigarettes. While we will not assume that Congress wished to protect the economy at the expense of life and health, it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue. Congress gave the benefit of every doubt to the possibility that the benefits of smoking might outweigh the

selves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.[26]

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potential danger to health; but that is not to say that it wished to conceal from the public the true extent of the danger. It is true that the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information. That possibility is a necessary consequence of the Commission's proper reluctance to dictate the content of broadcast material. See Part II, *infra*. But the ruling is reasonably designed to promote the diffusion of information; it is plainly not the substantial equivalent of the required "warnings" in advertisement which Congress has prohibited.

[26] Apart from the declaration of policy to establish a "comprehensive" program—which is meaningful only after we discover what subject matter is comprehended—petitioners rely primarily on the broad scope of the congressional hearings from which the Act emerged. The Senate Commerce Committee heard wide-ranging testimony on all aspects of the smoking-health controversy, including the views of the FCC. Congress also considered proposals for more drastic congressional action than that taken by the Act. But the fact that Congress considered and declined to adopt broader legislation does not establish that it intended to bar otherwise-authorized agency action under established powers and duties.

Petitioners also make much of the fact that the FCC, through its Chairman, specifically told Congress that it had no present plans for regulatory action addressed to the smoking-health problem and that it preferred the across-the-board approach taken by the FTC. While it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation. We must decide questions of legislative intent by the lights we have, not by those we might have had.

Nor do we think the FCC's 1964 disclaimer of intent to deal with the cigarette problem deprives it of authority it would otherwise have had to do so now. It is not suggested that the FCC acted in bad faith. The 1964 statement came at a time when the FTC was conspicuously taking the lead oar in attacking the problem on a media-wide front. The FCC may well have been

This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." [27] Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their own advertising messages.[28] Even if these policies implicitly preempt regulations *of advertising* substantially equivalent to the FTC's proposed required warnings,[29]

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reluctant in those circumstances to place a special burden on the communications industry. Primarily because of the Cigarette Labeling Act, the FTC's broad attack is now stalled. *Supra*, note 20. If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action.

[27] Act, § 2, text at note 16, *supra*.

[28] In the Congressional hearings on proposed cigarette legislation, tobacco industry spokesmen appeared to view the FTC's rule requiring them to include warnings in their advertising as uniquely obnoxious. One of them, for example, told the House Commerce Committee that

> the insistence upon a warning in advertising, in addition to the demand for a warning on labels, is punitive in nature. The right to advertise—an essential commercial right—is virtually destroyed if a manufacturer is required in every advertisement to disparage the product.

Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., p. 284 (1964).

[29] The Commission thought the Act implicitly forbade a requirement that stations present warning statements immediately "adjacent" to each cigarette commercial. We need not decide whether such a requirement, though not a regulation of *advertising*, is so nearly identical to such a regulation in purpose and effect as to fall within the statute's prohibition.

they do not exclude a single, uniform regulation *of broadcasters* designed to inform the public.

II. The Commission's Authority Under the Public Interest Standard of the Communications Act.

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority. The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communications Act and relied upon "the licensee's satutory obligation to operate in the public interest." [30]

Last year in *Red Lion Broadcasting Co.* v. *FCC*,[31] we upheld the fairness doctrine in the face of arguments that it was unauthorized and unconstitutional. Since then, in *Radio Television News Directors* v. *FCC*,[32] the Seventh Circuit has held that the Commission's personnal attack rules violate the First Amendment and, in so doing, has cast some doubt on the constitutionality of the underlying fairness doctrine.[33] These issues are now to be resolved by the Supreme Court.

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[30] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 927.

[31] 127 U.S. App. D.C. 129, 381 F. 2d 908, *cert. granted*, 389 U.S. 968 (1967), argument postponed pending decision of the Seventh Circuit in *Radio Television News Directors Ass'n* v. *United States* (*infra* note 32), 390 U.S. 916 (1968).

[32] Nos. 16369, 16498, 16499 (7 Cir., decided September 10, 1968).

[33] The Court of Appeals distinguished the personal attack rules from the underlying fairness doctrine on two grounds. First, the rules represent an unusual particularization of the doctrine, since they impose detailed tests for determining which individual broad-

In part for this reason, we do not think protracted discussion of the fairness doctrine will materially advance our inquiry. It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel application. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentations of controversial public issues must be fair and balanced.[34] The narrow issue presented by the facts of that case was whether a station in the temperance belt which advertised alcoholic beverages could, consistently with the principles now known as the fairness doctrine, refuse to accept anti-

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casts trigger the stations' duty to provide reply time and since, unlike the cigarette ruling, they also leave the stations little discretion as to how that duty may be fulfilled. Second, the personal attack rules are enforceable by penalties for individual infractions rather than solely by consideration of a station's overall performance in the proceedings for renewal of a license. *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32 (slip opinion, pp. 16-17). Nonetheless, the court expressly refused to decide the constitutionality of the fairness doctrine itself. *Id.*, p. 23. It did decide that the objective of a fair and balanced presentation of issues of public importance does not justify rules which are likely to inhibit public debate on political issues and might, by their vagueness, set up the Commission as a de facto censor of individual editorial and political broadcasts. This holding cuts very near the heart of the fairness doctrine. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[34] Petition of Sam Morris, 11 F.C.C. 197 (1946). This opinion in fact predates the first formal articulation of the policies now known as the "fairness doctrine" in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, *supra* note 33. But the basic requirement of fair and balanced presentation of controversial issues of public importance dates from decisions of the old Radio Commission and from the early rulings of the FCC. See *Red Lion Broadcasting* v. *FCC*, *supra* note 31, 127 U.S. App. D.C. at 138-39, 381 F. 2d at 917-18, and cases cited therein.

liquor advertising from temperance groups.[35] The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. In addition, except for the personal attack rules struck down by the Seventh Circuit,[36] we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine.[37] We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.[38] Finally, the Commission itself concluded that its main point would be lost if the legal debate concentrated too intensely on the "specifics of the fairness doctrine."[39]

None of the novel aspects of the ruling, of course, precludes an extension of the fairness doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard. Thus, whether

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[35] The Commission observed, "[I]t can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance," and concluded that the issue of whether or not to drink "may assume the proportions of a controverted issue of public importance." 11 F.C.C. at 199. It did not, however, deny renewal of the respondent station's license for failure to provide time to the temperance advocates.

[36] *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32.

[37] The Commission has, upon rare occasion, identified specific issues it regards as controversial. *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, 3 P & F Radio Reg. 259 (1946). But it has not previously gone so far as to prescribe the frequency with which opposing views must be broadcast.

[38] The Commission has refused to require reply time for atheists who wish to respond to the implicit theism of broadcast church services. Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d 263 (1965). *But see*, Robert Harold Scott, *supra* note 37.

[39] Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 949.

the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same. Moreover, in view of the constitutional attack on the doctrine, the specific question of greatest long-term importance may be whether the cigarette ruling can stand on its own feet.

In fact, we think the best statement of the Commission's holding and rationale is contained in the summary paragraph introducing the "Conclusions" section of its opinion:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" . . . is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it . . . . But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.[40]

[40] *Id.*

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard; and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

A. *The Commission's authority over broadcast content in general*

Nothing in the Communications Act of 1934[41] expressly grants the Commission any general authority over programming. The most relevant provisions go no further than to authorize it to grant and renew broadcast licenses according to the dictates of the "public interest, convenience, and necessity."[42] A case could be made, as an abstract proposition, that this licensing power is limited to policing the traffic over the airwaves to prevent interference between stations and perhaps to assure a minimum level of technical competence. If the question were *res nova*, that case would receive substantial support from the Supreme Court decisions requiring a clear mandate for regulatory activity which brushes closely against sensitive constitutional areas.[43]

But the argument was in fact made and rejected long ago

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[41] 47 U.S.C. § 301 *et seq.* (1964).

[42] 47 U.S.C. § 307(a), (d) (1964).

[43] *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).

in *National Broadcasting Company* v. *United States.*[44] Justice Frankfurter, speaking for the Court, said in part:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [*sic*], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." . . . .
>
> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio . . . .
>
> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest."[45]

In fact, neither courts nor Commission have thought it had to make its decisions among competing applicants blind-

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[44] 319 U.S. 190 (1943).

[45] *Id.* at 216-17.

folded to the content of their programs.[46] Both the old Radio Commission and the FCC have likewise refused to renew licenses on the basis of past programming not in the public interest,[47] and this Court affirmed such a refusal as long ago as 1931.[48] If agency power to designate program-

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[46] In *Simmons* v. *FCC*, 83 U.S.App.D.C. 262, 264, 169 F.2d 670 672, *cert. denied*, 335 U.S. 846 (1948), this court said:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.

See also, e.g., Henry v. *United States*, 112 U.S.App.D.C. 257, 302 F.2d 191, *cert. denied*, 371 U.S. 821 (1962); *Allen B. Dumont Laboratories* v. *Carroll*, 184 F.2d 153, 156 (3 Cir. 1950); *Bay State Beacon* v. *FCC*, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948). *See generally* Note, "Regulation of Program Content by the FCC," 77 HARV. L. REV. 701 (1964) and numerous cases cited therein. Also noteworthy in this regard is the concurring opinion of Justice Brennan in *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 433 (1963), which grapples at length with the possibility that the FCC's authority to regulate advertising content is so complete as to exclude any state regulation in that area. Justice Brennan concludes that not all state regulation is excluded, but observes that Congress's "failure expressly to regulate *nondeceptive* advertising surely does not deprive the FCC of all such jurisdiction . . . ." *Id.* at 444.

[47] Community Broadcasting Service, 13 P & F Radio Reg. 179 (1965); Port Frere Broadcasting Co., 5 P & F Radio Reg. 1137 (1950); *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 U.S.App.D.C. 311, 62 F.2d 850 (1932); *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 60 App.D.C. 79, 47 F.2d 670 (1931).

[48] In *KFKB Broadcasting Ass'n*, *supra* note 47, this court upheld the denial of a license to a station which regularly broadcast a program in which a doctor diagnosed illnesses and prescribed medicines on the basis of symptoms described in listeners' letters. The grounds for denial were both that the doctor, who controlled the station, was using it for his own private interests and also that the

ming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest.[49] And whatever the limits imposed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.[50]

"medical question box" program was "inimical to the public health and safety, and for that reason [was] not in the public interest." 60 App.D.C. at 80, 47 F.2d at 672. The court said:

> It is apparent, we think, that the [broadcasting] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits shall ye know them." Matt. VII:20.

Id. at 81, 47 F.2d at 672. *Accord,* Trinity Methodist Church, South, *supra* note 47.

[49] In 1959, Congress amended the provision requiring broadcasters to provide equal time to opponents of candidates for public office who use their stations, 47 U.S.C. § 315 (1964), in order to exempt bona fide newscasts, news interviews, news documentaries, etc., from that requirement. In so doing it included the proviso that nothing in the exemption

> shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest* and to afford reasonable opportunity for the discussion of conflicting views on isues of public importance.

73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964) (emphasis added). At the very least, this language appears to be an acknowledgement of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content.

[50] *Infra,* Part III.

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act[51] and the First Amendment alike. But elementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Indeed, in some cases fairness to the stations may require some advance warning of their responsibilities.

Thus, in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—*e.g.*, to strike a balance between the various interests of the community,[52] or to provide a reasonable amount of time for the presentation of programs devoted to the

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[51] Section 326 of the Communications Act of 1934 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . ., and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1964)

[52] *Editorializing by Broadcast Licensees*, *supra* note 33, 13 FCC at 1247-48.

discussion of public issues.[53] The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.[54] In practice, the Commission rarely denies licenses for breaches of these duties.[55] Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.

In other areas, however, the Commission has on occasion imposed more specific duties or found specific programs or advertisements to be contrary to the public interest.[56] Such rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship. But particularity is not in itself a vice; indeed,

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[53] *Id.* at 1249.

[54] *Id.* at 1251-52.

[55] "Generally, where objectionable matter has been broadcast in particular instances, renewal of licenses has been granted, usually upon a showing that program services were otherwise meritorious and in the public interest and the objectionable matter discontinued . . . ."

Note, "Governmental Regulation of the Program Content of Television Broadcasting." 19 G.W. L. REV. 312, 317 (1950). *See also* Note, "Regulation of Program Content by the FCC," *supra* note 46, at 703-04.

[56] *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, *supra* note 37; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission, Trinity Methodist Church, South* v. *FCC*, and Port Frere Broadcasting Co., all *supra* note 47; Mile High Station, Inc., 20 P & F Radio Reg. 345 (1960); WSBC, Inc., 2 F.C.C. 293 (1936; Oak Leaves Broadcasting, 2 F.C.C. 298 (1936); Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936); and cases cited in Note, "Governmental Regulation of the Program Content of Television Broadcasting," *supra* note 55, at 317 n. 27, 317-18 n. 28.

in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming.

B. *The authority for the cigarette ruling in particular*

Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act.[57] However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[58]

The ruling before us neither forbids nor requires the publication of any specific material. But as an extension of the fairness doctrine it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot up-

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[57] See note 51, *supra*. It is not clear whether Congress originally thought that such rulings as to program content would constitute "censorship." See Note, 46 HARV. L. REV. 987, 990 (1933). But in view of the settled administrative practice of issuing such rulings and opinions, the doubtful issue of construction must be resolved in the negative. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[58] The Supreme Court has suggested that the "public interest" standard may be narrowed by interpreting it in the light of "its context, . . . the nature of radio transmission and reception, [and] . . . the scope, character, and quality of services . . . ." *Federal Radio Commission* v. *Nelson Brothers*, 289 U.S. 266, 285 (1933). While these criteria may be sufficiently precise administrative standards to govern regulation of technical performance and selection among competing applicants, however, we think they are too amorphous, without more, to support supervision over programming.

hold it merely on the ground that it may reasonably be thought to serve the public interest.

Whatever else it may mean, however, we think the public interest indisputably includes the public health.[59] There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the state's police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

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[59] Petitioners WTRF-TV and the National Association of Broadcasters argue that, if the FCC has any authority with respect to advertising, it can apply only the more specific standard Congress has established to guide the Federal Trade Commission, which they say is vested with "primary" authority to regulate advertising. Thus, they would limit the FCC's role to policing "unfair methods of competition . . . and unfair or deceptive acts or practices," Federal Trade Commission Act § 5 (1914), 15 U.S.C. § 45(a) (1964), at least absent any considerations peculiar to broadcasting. Their sole authority for that proposition is *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). That case, however, is not in point. There the FCC had adopted regulations disapproving of give-away programs on the ground that they were "lotteries" within the meaning of federal prohibitory statutes. The Supreme Court reversed on the ground that the FCC had misread the criminal statutes, but that reversal did not in itself preclude FCC authority to prohibit such programs as inconsistent with the public interest. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). In any case, the standard of the Federal Trade Act is applicable only to regulation of advertising. While the obligations imposed under the cigarette ruling arise from and are conditioned upon the broadcasting of cigarette advertising, the ruling does not regulate advertising. Rather, it has the effect of regulating stations which carry advertising by requiring them to inform the public.

The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of specious medical information was not in the public interest.[60] In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the "public interest, convenience and necessity" to the FCC,[61] which has also ruled specific controversial health claims to be not in the public interest.[62] Given the premise that the "public interest" may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary, we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance.

The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests. Finally, the Commission itself has no special expertise to make it the appropriate arbiter of controversies over whether particular broadcasting is dangerous to health.

But the ruling on cigarette advertising is vulnerable to none of these objections against a broad mandate to the

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[60] *KFKB Broadcasting Ass'n* v. *Federal Radio Commission, supra* note 47.

[61] 47 U.S.C. § 307 (1964).

[62] WSBC, Inc., Oak Leaves Broadcasting, Inc., Farmers & Bankers Life Insurance Co., all *supra* note 56.

Commission to consider the public health.[63] The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health:[64]

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types

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[63] We agree with the Commission that "cigarette advertising presents a unique situation," and we note that the Commission "do[es] not now know" of any other advertised product which would warrant a comparable ruling. Cigarette Advertising, *supra* note 8, 9 F.C.C. 2d at 943.

[64] The Commission correctly noted that it "is not the proper arbiter of the scientific and medical issue . . . and of course has not sought to resolve it." *Id.* at 949. But the "controversial issue" to which its ruling is addressed is not whether cigarette smoking is dangerous, but whether, in view of its authoritatively documented dangers, it is desirable:

> It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke, but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose.

Id. at 939.

> of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute . . . . The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probablistic . . . . Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt . . . . The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.[65]

Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Fed-

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[65] *Id.*, concurring opinion of Commissioner Loevinger at 952-53.

[66] See note 64, *supra*.

[67] On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."

Cigarette Advertising, *supra* note 8, Appendix A at 950.

[68] The Department promptly established the National Interagency Council on Smoking and Health in order, *inter alia*, to

> use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking. . . .

Id., Appendix A at 951. In 1967, HEW also released the Surgeon General's "Report on Current Information on the Health Conse-

eral Trade Commission,[69] and the Senate Commerce Committee,[70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers; his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.

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quences of Smoking," which reaffirmed the conclusions of the 1964 Report, *supra* note 67, on the basis of more than 2,000 subsequent research studies. This report asserted that cigarette smokers have substantially higher death and disability rates than comparable non-smokers and that a substantial number of earlier deaths and disabilities would not have occurred if the victims had never smoked. *Id.* at 936-37.

[69] Note 20, *supra*.

[70] While there remain [sic] a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.

S. Rep. No. 195, 89th Cong., 1st Sess., p. 3 (1965).

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.[71]

The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."

III. The First Amendment

It is difficult to separate the First Amendment question from the question of the Commission's authority. Section 326 of the Communications Act expressly provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[72] It might reasonably be thought that "the right of free speech," is shorthand for the First Amendment. But since constructions of the First Amendment have broadened since 1934, and inasmuch as the First Amendment argument

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[71] Cigarette Advertising, *supra* note 8, at 941-42.

[72] *Supra*, note 51.

advanced in this case challenges a long-settled construction of the Act, we treat the constitutional question separately for purposes of analysis.

A. *Regulation of broadcast content under the First Amendment in general*

Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the second, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber the newspapers.[73] Accordingly, in their view the First Amendment now limits the Commission's licensing discretion to technological considerations; the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and

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[73] See *Radio Television News Directors Ass'n* v. *FCC*, *supra* note 32 (slip opinion, pp. 25-27), where the Seventh Circuit declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes.

the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege."[74] It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press,[75] but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.[76] Moreover, the broadcasting medium

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[74] See G. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 152 (1967).

[75] *E.g., Near* v. *Minnesota*, 283 U.S. 697 (1931).

[76] It has also been suggested that a difference in the working of the market mechanism in the two media may justify a difference in the scope of permissible regulation under the First Amendment. It is in a newspaper's economic interest, it is said, to include features which may appeal only to a limited or specialized audience. The cost of adding a page to include special features is relatively small compared to the advertising and subscription revenue which may be expected from the resulting increase in circulation. But a broadcaster can appeal to only one audience at a time. If he devotes an hour to programs appealing to a minority taste, he foregoes the chance to compete for the greater advertising revenues consequent upon reaching a larger audience. Accordingly, it may

may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[77]

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be that even newspaper monopolies are more likely than broadcasters to serve the entire public without regulatory prodding. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 714. For support from economists for the proposition that broadcasters will compete for the majority audience at the expense even of a sizeable minority taste, see J. Dirlam and A. Kahn, *The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television,* 77 YALE L.J. 494, 515-17 (1968).

[77] The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses—hearing and seeing. . . . Psychological memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See, *e.g.*, Elliott, *Memory for Visual, Auditory, and Visual-Auditory Material,* 29 ARCHIVES OF PSYCHOLOGY No. 199, at 52-54 (1936).

Note, "Illusion or Deception: The Use of 'Props' and 'Mock-ups' in Television Advertising," 72 YALE L.J. 145, 156 n. 46 (1962). *See generally,* V. Packard, THE HIDDEN PERSUADERS (1957).

B. *Constitutionality of the cigarette ruling in particular*

These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development"[78] with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep . . . widely and . . . indiscriminately" across protected freedoms,[79] the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press. We reach this conclusion in the light of the following considerations:

(1) The cigarette ruling does not ban any speech. In traditional doctrinal terms, the constitutional argument against it is only that it may have a "chilling effect" on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising.

(2) The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some utterances fall outside the pale of First Amendment concern.[80] Many cases indicate that product advertising is at least less rigorously

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[78] Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

[79] *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964).

[80] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Roth* v. *United States*, 354 U.S. 476 (1957).

protected than other forms of speech.[81] Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. In the instant case, this argument is not dispositive because the cigarette ruling was premised on the fact that cigarette advertising implicitly states a position on a matter of public controversy. But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of . . . slight social value as a step to truth. . . ."[82]

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[81] *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110-11 (1943); *Martin* v. *Struthers*, 319 U.S. 141, 142 n. 1 (1943); *Jamison* v. *Texas*, 318 U.S. 413, 417 (1943). In *Head* v. *New Mexico Board of Examiners*, the Supreme Court upheld as a health measure a state law prohibiting price-advertising by optometrists. 374 U.S. 424 (1963). It did not reach the First Amendment question because that question had not been properly raised in the state court. *Id.* at 433 n. 12. However, in a lengthy concurring opinion, *supra* note 46, Justice Brennan considered the principal issue to be whether in the Communications Act Congress had occupied the field of regulation of broadcast advertising. *Id.* at 433 *et seq.* There was no dissent. The Court's collective treatment of this case strongly discounts the possibility that it thought such regulation poses serious constitutional problems.

[82] *Chaplinsky* v. *New Hampshire*, *supra* note 80, at 572.

(3) In any event, the danger that even this marginal "speech" will be significantly chilled as a result of the ruling is probably itself marginal. We cannot, of course, undertake an economic analysis to determine the probability that the volume of cigarette advertising over radio and television will decline. We can say with fair certainty, however, that the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public. We note also that cigarette advertising accounts for a sizable portion of broadcasting revenues,[83] and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling.[84]

(4) Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance.[85] That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate

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[83] The briefs indicate that radio and television revenues from cigarette advertising total nearly $300,000,000 annually and account for more than 7% of all television revenue.

[84] The Commission has in fact promised to "tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry." Cigarette Advertising, *supra* note 8, at 944.

[85] See, *e.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 148-50 (1967) (opinion of Justice Harlan); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all.[86] But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged

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[86] The main thrust of the Seventh Circuit opinion invalidating the FCC's personal attack rules under the First Amendment is that "strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules." *Radio Television News Directors Ass'n* v. *FCC, supra* note 32 (slip opinion, p. 17). The rules themselves, the Court said, "reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills." *Id.* pp. 17-18. Thus, the Court was concerned that both the amount and the vigor of debate might be reduced.

debate is served, not hindered, by an attempt to redress the balance.[87]

(5) Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

IV. Other Contentions

The resolution of these basic questions leaves a residue of unanswered contentions. Mr. Banzhaf's complaint that the anti-smokers should have been granted equal time need not detain us. Even if it had authority to specify equal time, the Commission could reasonably find such a specific requirement an unnecessary intrusion upon the licensees'

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[87] *Cf. Radio Television News Directors Ass'n* v. *FCC*, *supra* notes 32 and 86: "[T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting . . . and that it is unable to attain such fairness by less restrictive and oppressive means." (Slip opinion, p. 27) In the instant case, we think that on balance First Amendment interests are advanced by the Commission's ruling. Moreover, the additional public interest at stake is compelling. And the technique of requiring the presentation of opposing views is markedly less "restrictive and oppressive" than many attacks on the cigarett-health problem which might well be within the power of federal agencies, but for the Cigarette Labeling Act.

discretion. Likewise, the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. And an issue of "fairness" arises principally because the cigarette manufacturers are deterred from making health claims in their advertisements by the FTC's warning that such claims would be "unfair and deceptive." [88] If the FTC's determination is in error, the remedy does not lie in a further particularization of the FCC's fairness doctrine.

Finally, The Tobacco Institute contends that the Commission's ruling is void on account of procedural irregularities. The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights. The Tobacco Institute also intimates that the Commission should have held an oral hearing, should have made factual investigations of its own, or should have instituted a full-fledged rule-making proceeding, before issuing its ruling. As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency. But the essential premises of the instant ruling are only (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit, (2) that very substantial medical and scientific authority

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[88] *E.g.*, FTC, Order Vacating Trade Regulation Rule, 30 Fed. Reg. 9484, 9485 (1965). Industry codes also disapprove of affirmative health claims in cigarette advertising, but in the circumstances we hardly think this self-regulation makes out a sufficient case to require compensatory relief from the FCC.

regards this habit as highly dangerous to health and therefore undesirable, and (3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. These premises are supported by the record. We do not see, and The Tobacco Institute has never suggested, what evidence a more extensive proceeding might have produced to refute them.

Affirmed.

WILBUR K. MILLER, *Senior Circuit Judge:* I concur in the affirmance of No. 21,285, *Banzhaf* v. *Federal Communications Commission and United States,* but I dissent from the affirmance of Nos. 21,525-6, *WTRF-TV* v. *Federal Communications Commission and United States,* and from the affirmance of No. 21,577, *Tobacco Institute, Inc.* v. *Federal Communications Commission and United States.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 21,285

John F. Banzhaf, III, *Petitioner*

v.

Federal Communications Commission and
United States of America, *Respondents*

WTRF-TV, Inc. and National Association of
Broadcasters,
American Broadcasting Companies, Inc.,
The Tobacco Institute, Inc.,
The American Tobacco Company,
Brown & Williamson Tobacco Corp.,
Larus & Brother Co., Inc.,
Liggett & Myers Tobacco Co.,
Philip Morris, Inc.,
R. J. Reynolds Tobacco Co.,
United States Tobacco Co.,
P. Lorillard Co.,

Intervenors

Nos. 21,525 and 21,526

WTRF-TV, Inc. and National Association of Broadcasters *Petitioners*

v.

Federal Communications Commission and United States of America, *Respondents*

Heart Disease Research Foundation,
Spartan Radiocasting Co.,
Palmetto Radio Corp.,
W.A.V.E., Inc., WFIE, Inc., and WFRV, Inc.,
Indiana Broadcasting Corporation,
Gulf Television Corporation,
Corinthian Television Corporation,
Great Western Broadcasting Corp.,
Columbia Broadcasting System, Inc.,
WLLE, Inc.,
National Broadcasting Company, Inc.,
American Broadcasting Companies, Inc.,
The Tobacco Institute, Inc.,
The American Tobacco Company,
Brown & Williamson Tobaccco Corp.,
Larus & Brother Co., Inc.,
Liggett & Myers Tobacco Co.,
Philip Morris, Inc.,
R. J. Reynolds Tobacco Co.,
United States Tobacco Co.,
P. Lorillard Co.,
John F. Banzhaf, III,

Intervenors

No. 21,577

The Tobacco Institute, Incorporated, et al., *Petitioners*

v.

Federal Communications Commission and United States of America, *Respondents*

On Petitions for Review of Orders of the Federal Communications Commission

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on review in these cases are hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson,
Clerk

Dated: November 21, 1968

Senior Circuit Judge Wilbur K. Miller concurs in affirmance in No. 21,285, *Banzhaf* v. *Federal Communications Commission and United States,* but dissents from affirmance in Nos. 21,525-6, *WTRF-TV* v. *Federal Communications Commission and United States* and from affirmance in No. 21,577, *Tobacco Institute, Inc.* v. *Federal Communications Commission and United States.*